February 21, 2026

VIA ECF

The Honorable Arun Subramanian
United States District Judge
United States District Court, Southern District of New York
500 Pearl Street, Courtroom 15A
New York, NY 10007-1312

Re: *United States et al. v. Live Nation Entertainment, Inc. et al.*; 1:24-cv-03973-AS

Dear Judge Subramanian:

This Court's February 18 Summary Judgement Order (ECF 1037) dismissed claims from Plaintiffs' amended complaint related to two promotions markets, but held that all remaining claims would proceed to a jury trial as scheduled. Defendants hastily filed letter motions attempt to dramatically expand the Court's ruling, urging dismissal of tying claims (ECF 1048) this Court already ruled should proceed to trial and exclusion of all evidence related to conditioning (ECF 1049). These arguments ignore the Court's repeated rulings regarding the tying claims and its conclusion that Plaintiffs' claims independently involve relevant evidence related to Defendants' illegal conditioning.

Defendants' Tying is Per Se Illegal

Plaintiffs allege a *per se* tying claim. The Court was correct when it stated in its summary judgment opinion that "true illegal tying is inherently linked with anticompetitive effects." SJ Op. at 32-33 (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12-13 (1984)). *See also Hill v. A-T-O, Inc.*, 535 F.2d 1349, 1353 (2d Cir. 1976); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 463 (1992) (denying summary judgment on tying claim where the "record indicates that Kodak would sell parts to third parties only if they agreed not to buy service from ISO's"). This makes sense because illegal tying arrangements "serve hardly any purpose beyond the suppression of competition"—largely because they force buyers to "forego their free choice between competing products." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 6–7 (1958). Thus, although some Second Circuit cases such as *Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp.*, 880 F.2d 1514 (2d Cir. 1989) and *Kaufman v. Time Warner*, 836 F.3d 137 (2d Cir. 2016) identify an "anticompetitive effects" requirement, that requirement is satisfied in a per se tying claim when the four per se elements described in *Jefferson Parish* are established.

Other Second Circuit decisions analyzing per se illegal tying have omitted the phrase "anticompetitive effects" entirely when describing the elements of a per se unlawful tie: "(1) the tying arrangement affects a substantial amount of interstate commerce; (2) the two products are distinct; (3) the defendant actually tied the sale of the two products; and (4) the seller has appreciable market power in the tying market." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 133 n. 5 (2d Cir. 2001), *overruled on other grounds In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *accord United States v. IBM Corp.*, 163 F.3d 737, 741 (2d

Cir. 1998); *Park Irmat Drug Corp. v. Optumrx, Inc.*, 152 F. Supp. 3d 127, 139 (S.D.N.Y. 2016); Areeda & Hovenkamp, Antitrust Law ¶ 1702 (hereinafter "Areeda"). This formulation follows Supreme Court precedent that—should those factors be met—a Plaintiff successfully "invok[es] the per se rule against tying and thereby avoid[s] analysis of actual market conditions" because such a tie is inherently anticompetitive. *Jefferson Parish*, 466 U.S. 2, 26 (1984); *accord Fortner Enter., Inc. v. United States Steel Corp.*, 394 U.S. 495, 501 (1969) ("the *per se* doctrine['s] . . . requirement that a 'not insubstantial' amount of commerce be involved makes no reference to the scope of any particular market or to the share of that market foreclosed by the tie"); Areeda ¶ 1702 (for per se tying, "courts do not insist that 'anticompetitive effect' be assessed by the usual manner of measuring the share of the market for the tied product foreclosed by the tie and assessing the significance of that foreclosure share in the particular market context").

During the February 19 teleconference, Defendants suggested for the first time that some type of detailed market definition analysis is required to identify the separate "products" for a Section 1 tying claim. Defendants are wrong. While some cases suggest that a tying claim required "anticompetitive effects in the tied market," *see, e.g., Gonzalez*, 880 F.2d at 1516–1518; *Yentsch v. Texaco*, 630 F.2d 46, 56–57 (2d Cir. 1980); *Coniglio v. Highwood Servs.*, 495 F.2d 1286, 1289 (2d Cir. 1974), they did not perform or require formal market definition for the tied product. Rather, they "either ignored that additional [effects] requirement or employed it very circumspectly to eliminate a specified class of relatively harmless tie-ins from per se condemnation." Areeda ¶ 1722c (discussing Second Circuit case law); *id*. (discussing how some courts did not "giv[e] it any content" or listed it without "applying it");[1] *see e.g.*, *Allen-Myland v. Intern. Business Mach. Corp.*, 33 F.3d 194, 200-01, 211-16 (3d Cir. 1994) (compare extensive discussion defining relevant tying market with limited assessment of demand for a tied product); *see also Gonzalez*, 880 F.2d at 1516, 1518 ("This case demonstrates the difficulty in applying a per se illegality rule in situations that do not usually present antitrust law issues"—i.e., instances where the "de minimis" test of affected commerce may not be met).

As one district court in this Circuit explained: "where a tying arrangement may be condemned as illegal *per se*, plaintiffs need not allege, let alone prove, an element relevant to a rule-of-reason inquiry: i.e., "anticompetitive effects in the tied market." *In re Wireless Telephone Services Antitrust Lit.*, 385 F. Supp. 2d 403, 414 (S.D.N.Y. 2005) (further explaining that "[i]f a plaintiff succeeds in establishing the existence of sufficient market power to create a *per se* violation, the plaintiff is also relieved of the burden of rebutting any justifications the defendant may offer for the tie"). "Because the Supreme Court has repeatedly held that tying, if it fits within the [above] standard, is a per se violation," courts "are not free to inquire whether such tying in any given case injures market competition." *Ohio-Sealy Mattress Mfg. Co. v. Sealy*, 585 F.2d 821, 835 (7th Cir. 1978), *citing Coniglio*, 495 F.2d 1286; *see also* Areeda at ¶ 1702.

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[1] Notably, Defendants cite to these same Areeda passages (¶¶ 1702 and 1722c), with no mention of this explanation or context, and proceed to cite the cases that Areeda flags as outliers. *See* ECF 1051 at 1.

Defendants' other cited tying cases provide little, if any, support for their position. Some involve rule-of-reason tying claims. *See, e.g., Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F. 2d 468, 481, 494 n.38 (3d Cir. 1992) (citing to footnote in section headed: "Rule of Reason Liability"). Others fail to distinguish between per se and rule-of-reason standards (or Section 1 and Section 2 standards), while featuring factual circumstances far removed from the present matter. For example, *Kaufman* did not identify whether the tying claim was per se or rule of reason, and affirmed dismissal on the elements of separate products and tying product market power. *Kaufman*, 836 F.3d at 140, 143-48 (2d Cir. 2016). Similarly, *Cavalleri v. Hermes Int'l* addressed Section 1 and 2 claims collectively, and faulted plaintiffs' alleged "tied product" for being a "kaleidoscope" of varied and unrelated products. 2025 WL 2662897 at *2 (N.D. Cal. Sept. 17, 2025); *accord Truck-Rail Handling, Inc. v. Burlington N. & Santa Fe Ry. Co.*, 244 F. App'x 130, 131-32 (9th Cir. 2007) (addressing both per se and rule of reason—and monopolization and attempted monopolization—claims in a single, brief paragraph). The court in *Sidebe v. Sutter Health* likewise struggled with the distinction between types of tying claims, despite the plaintiff's pointing out that the court was "blur[ring] the line between a per se and rule of reason analysis." 4 F.Supp.3d 1160, 1178-79 (N.D. Cal. 2013); *accord Packaging Systems v. PRC-Desoto Int'l,* 268 F.Supp.3d 1071 (C.D. Cal. 2017) (same). But that is not a legitimate basis for overriding the clear Supreme Court precedent discussed above.

<u>Defendants' Tying Would Also Be Illegal Under a Rule-of-Reason Analysis</u>

Defendants' tie is per se illegal, but even if a rule-of-reason analysis applied, dismissal of the Section 1 tying claim would be inappropriate. Areeda ¶ 1702 ("[a]rrangements not unlawful [per se] might be unlawful under the rule of reason . . . even in the absence of any 'tying' product over which the supplier has power, or of the 'separate products' that per se tying law requires"); *see also Fortner*, 394 U.S. at 500 ("inability to satisfy [the per se] standards" are not "fatal to a plaintiff's case" as "[a] plaintiff can still prevail on the merits whenever he can prove, on the basis of a more thorough examination of the purposes and effects of the standards involved"—i.e., through a rule of reason analysis—"that the general standards of the Sherman Act have been violated"); *In re Wireless*, 385 F. Supp. 2d at 415 (if "the showing of market power is insufficient to find a *per se* violation of antitrust law, courts apply a rule of reason analysis at the fact-finding stage through a burden shifting scheme").

The key difference is that "[i]n order to prevail in the absence of per se liability," the factfinder must make "an inquiry into the actual effect . . . on competition" in the tied market. *Jefferson Parish*, 466 U.S. at 29; *see also In re Wireless*, 385 F. Supp. 2d at 415 (under a rule-of-reason tying analysis, a plaintiff may demonstrate "an actual adverse effect on competition" through "examining factors like reduced output, increased prices and decreased quality" or "significant barriers to entry into a particular market") (cleaned up). Here, this Court found that Plaintiffs have provided evidence of such effects in the form of decreased consumer (artist) choice in promotion services, as well as decreased quality and decreased output (dark days). SJ Op. 32-33. Those are sufficient, cognizable anticompetitive effects on promotion services, regardless of the precise contours of that market. *See also FTC v. Indiana Fed. of Dentists*, 476 U.S. 447, 460–61 (1986).

For that reason alone, it makes no difference for the tying claim that the Court held that plaintiffs failed to present a genuine issue of material fact that the alleged *tied* product ("promotion services *for MCVs*") "differ from other kinds of promotion services." SJ Op. 8-9. What matters is that artists are *forced* to buy a product from Defendants that they otherwise could have purchased from a competitor. There is no disputed issue that promotions services to artists are a separate product. *See* Defendants' Summary Judgment Reply Brief, at 2-3 (ECF 797) ("There is agreement on "what *products or services* compete with which others" and "which providers count" with respect to promotion services.). Here, the tie has to do with the forced purchase of promotions services at both the show level and for amphitheater tours.

Threats, Retaliation, and Content-Conditioning are Relevant to Remaining Claims

Defendants also are wrong in seeking to exclude evidence of retaliatory threats and content conditioning for the plaintiffs' claims related to primary ticketing and venues that will proceed to trial.

First, Defendants misleadingly try to take advantage of this Court's rejection of the *artist*-facing promotions market. But that market is not the locus of Live Nation's threats to divert shows from venues unless they use Ticketmaster's ticketing services. (Am. Compl. ¶ 227). Although that claim does not require market definition other than for the monopolized primary ticketing market, to the extent a second market is implicated by Live Nation's threats to cut off venues, it is a different market—the market for concert booking and promotion services *to venues*. With respect to that market, this Court *denied* Defendants' motion for summary judgment, finding a genuine issue of fact both on the market's existence and Live Nation's monopoly power therein. SJ Op. at 24. Thus, the premise of Defendants' letter is inapposite.

Second, Defendants erroneously try to convert a factual dispute into a legal one. As part of its summary judgment ruling, this Court cited evidence showing that venues view Live Nation as the "dominant supplier of concerts in the United States." SJ Op. at 23. This Court further cited evidence that Live Nation credibly threatens to withhold content from venues that do not use Ticketmaster and that these dynamics influence a venue's ticketing decision and foreclose rivals. SJ Op. 40-41. This Court thus found factual disputes as to whether Defendants' content conditioning has a concrete effect in the primary ticketing market, precluding summary judgment. SJ Op. 40-41. Defendants want this Court now to ignore all these factual disputes and instead to presume there was no effect as a matter of law. But "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." *Eastman Kodak*, 504 U.S. at 466–67, and what matters is "the actual dynamics of the market rather than rote application of any formula." SJ Op. at 20.

Indeed, Defendants have an incorrect view of the applicable law. Plaintiffs' primary ticketing market claim focuses on Ticketmaster's monopoly in primary ticketing services and requires Plaintiffs to show monopoly power in the primary ticketing services market. There is no separate requirement whereby Plaintiffs have to prove monopoly power in concert promotion just to establish that its threats could have an effect in the separate market for primary ticket services. Even further, retaliatory threats are relevant to the Plaintiffs' remaining claims as "coercive behavior" and one of the showings that can be considered in "evaluating the legality of an exclusive dealing agreement." SJ. Op. at 35 (citing *ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 272 (3d Cir. 2012)).

Defendants wrongly insist that Live Nation's threats against venues should be viewed as a type of monopoly leveraging, but there is no legal reason why the claim has to be shoehorned into a particular box. Courts generally apply the *Microsoft* burden-shifting standard, because the forms of anticompetitive conduct are "myriad." *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc). And the use of threats is not limited to the monopoly-leveraging context.

Respectfully submitted,

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